

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

MAR 15 2007

COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2006-0313-PR
)	DEPARTMENT B
v.)	
)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
RUDOLPH CHARLES ARENAS,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20012407

Honorable Ted B. Borek, Judge

REVIEW GRANTED; RELIEF DENIED

Barton & Storts, P.C.
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Tucson
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ESPINOSA, Judge.

¶1 Following a jury trial in 2002, petitioner Rudolph Arenas was convicted of one count of second-degree murder and two counts of attempted second-degree murder. The trial court sentenced him to aggravated, consecutive prison terms totaling fifty-four years. We affirmed his convictions and sentences on appeal. *State v. Arenas*, No. 2 CA-CR

2002-0082 (memorandum decision filed Jan. 29, 2004). Arenas then filed a petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S., raising *inter alia*, a claim of newly discovered evidence. This petition for review followed the trial court's summary denial of post-conviction relief. Because we conclude the trial court did not abuse its discretion in dismissing the petition, we deny relief. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990).

¶2 In its order denying post-conviction relief, the trial court found Arenas was precluded from raising a claim of newly discovered evidence based on the existence of deoxyribonucleic acid (DNA) evidence because he had already raised a related claim on appeal. We concluded on appeal that the trial court had correctly found the DNA evidence presented in Arenas's motion for new trial to be merely cumulative and that it would not have changed the verdicts. Arenas's Rule 32 claims are based on the test results from DNA evidence found on the blue-tinted glasses worn by the shooter, which were found in the car in which Arenas had been riding when the shootings took place. The test results, prepared by a laboratory that Arenas had selected, were not available until after the jury had returned its verdicts. The report provided that the DNA on the glasses had come from at least two individuals besides Arenas and that "most individuals in the population would not be able to be excluded as a possible source of the DNA." At the hearing on the motion for new trial, the trial court noted that Arenas had known that the DNA test results would not be available before trial, yet he did not ask for a continuance despite the court's urging that he do so.

He chose, instead, to assert his right to a speedy trial and to proceed without the test results. Although the trial court found the test results “troublesome,” it nonetheless concluded Arenas was not entitled to a new trial because the evidence was cumulative and would not have changed the verdicts.

¶3 To constitute newly discovered evidence under Rule 32.1(e), Ariz. R. Crim. P., 17 A.R.S., the evidence must have existed at the time of trial but have been discovered after trial; the defendant must have exercised due diligence in discovering the evidence; the evidence must not be simply cumulative or impeaching; the evidence must be relevant; and it must be such that the outcome of the case likely would have been different if the defendant had had the evidence at trial. *State v. Apelt*, 176 Ariz. 349, 369, 861 P.2d 634, 654 (1993). All elements must be satisfied to establish a claim of newly discovered evidence. *See State v. Andersen*, 177 Ariz. 381, 387, 868 P.2d 964, 970 (App. 1993).

¶4 In this Rule 32 proceeding, Arenas has reasserted his previously raised claim of newly discovered evidence. He also argues that his recently retained expert, Brian Wraxall, will evaluate the previous DNA test results with the *anticipated* conclusion that “the report provided, and the analysis results, are, for the most part, meaningless”; provide “a more discriminatory test” on the original DNA evidence; and if there are remaining samples of DNA available that have not yet been tested, Wraxall will conduct his own “STR analysis” on that evidence. In his reply to the state’s answer to his petition, Arenas described this newly discovered evidence as follows:

[T]he report and analysis of the test conducted on the DNA, an expert opinion as to the value of the DNA test and analysis conducted, the potential for contamination of the DNA, and the potential for appropriate testing and analysis to be conducted on the DNA from the eyeglasses.

¶5 Arenas’s first two arguments, that Wraxall will provide an opinion on tests already performed and will perform new tests on the DNA already tested, are precluded, as the trial court correctly found. *See* Ariz. R. Crim. P. 32.2(a)(2), 17 A.R.S. (defendant is precluded from relief based on any ground “[f]inally adjudicated on the merits on appeal or in any previous collateral proceeding”). This “new” evidence, which is based on Wraxall’s “willingness to perform additional work on data available,” is nothing more than a permutation of the newly discovered evidence claim Arenas already raised in his motion for new trial, the denial of which was challenged on appeal. Moreover, Arenas has provided little support for his prediction that Wraxall will find the original analysis deficient. Arenas proffers only that “[a] member of [Rule 32] counsel’s staff has spoken with an expert[, presumably Wraxall, who] believes the report provided and the analysis of the results on the sunglasses was, for the most part, meaningless.” In short, Arenas’s arguments are essentially an attempt to reargue issues he already presented, without success, on direct appeal.

¶6 We also reject Arenas’s claim that he is entitled to relief because this court did not have the original test results before it on appeal. The original test results, which were available at the hearing on the motion for new trial, were clearly available when the appeal was filed. It was up to Arenas to include all necessary information in the record on appeal.

See State v. Jessen, 130 Ariz. 1, 8, 633 P.2d 410, 417 (1981) (appellant responsible to ensure any document necessary to an argument on appeal included in record on appeal).

¶7 Moreover, the purported new DNA evidence was merely cumulative and thus did not constitute newly discovered evidence as contemplated by Rule 32.1(e) in any event.

As we found on appeal:

No one denied that three other individuals had been in the car . . . and no one denied that the shooter’s identification was at issue. Arenas repeatedly presented testimony from witnesses and the victims about the possibility that another person in the car had shot the victims. The DNA evidence does nothing to clarify this issue and, in fact, demonstrates that Arenas could have touched the glasses at some point. Other possible inferences the jury could have made from the DNA testing already existed on this record. Arenas’s optometrist testified that Arenas had frequently purchased contact lenses from him but had neither purchased a pair of prescription glasses from him nor had ever brought in a frame to be fitted with prescription lenses. The optometrist had measured the prescription on the blue-tinted lenses and found that, although they were “a relatively common prescription for a young person,” they did not match Arenas’s prescription. He further testified that the prescriptions were sufficiently close to Arenas’s prescription that he could have seen while wearing the lenses. In light of this evidence, we cannot say the trial court abused its discretion in finding that the DNA results were merely cumulative.

¶8 Arenas’s third claim—that Wraxall might perform a new test on any remaining DNA evidence, if any such evidence exists—is not a claim of newly discovered evidence for the purposes of Rule 32. Not only does Arenas fail to explain why he did not propose additional testing at the hearing on the motion for new trial, but he does not explain why he

waited four years after he was sentenced to find this new expert, bringing into question his exercise of due diligence. In addition, he has not argued that the “more discriminating” STR test Wraxall will perform is based on technology that was not available when he filed his motion for new trial. Because Arenas failed to establish the requisite bases for relief under Rule 32.1(e), the trial court’s summary dismissal of this claim was proper.

¶9 Finally, we reject Arenas’s claim that he is entitled to an evidentiary hearing to present evidence on the issue of contamination of the glasses, which he claims was “never explored.” This claim, which the state addressed at the hearing on the motion for new trial, is precluded. *See* Ariz. R. Crim. P. 32.2(a). Accordingly, although we grant the petition for review, we deny relief.

PHILIP G. ESPINOSA, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

J. WILLIAM BRAMMER, JR., Judge